Supreme Court of the United States

October Term, 1976

No. 76-299

NED G. SAALFRANK,
Petitioner,

vs.

PARKVIEW MEMORIAL HOSPITAL, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 533 F.2d 325. This opinion reversed the decision of the District Court for the Northern District of Ohio, Western Division, which is reported at 390 F. Supp. 45.

QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction over third-party defendant, Parkview Memorial Hospital, Inc., Respondent herein, so as to enter judgment in favor of plaintiff, Ned G. Saalfrank, Petitioner herein, an Indiana

resident, and against Respondent, an Indiana corporation not doing business in the State of Chio, when the original basis for subject matter jurisdiction of the District Court was founded on diversity of citizenship pursuant to 28 U.S.C. §1332(a) and the party which impleaded Respondent under an alleged right of indemnification, in fact, had no such right of indemnification.

2. Whether a District Court, pursuant to Rule 54(b), Federal Rules of Civil Procedure, may retroactively realign parties four (4) months after trial so as to make Respondent (a third-party defendant during trial) a direct defendant of Petitioner (plaintiff during trial).

CONSTITUTIONAL PROVISION INVOLVED

In addition to the statute and rules of court involved as set forth in Petitioner's Petition for Writ of Certiorari (p. 2), the following provision of the Constitution of the United States is also involved:

Article III, §2, Clause 1:

> "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies of which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects."

STATEMENT OF THE CASE

This is a civil action in negligence commenced by Saalfrank, a citizen and resident of Indiana, against O'Daniel, a citizen and resident of Ohio, on February 25, 1971. Jurisdiction of the District Court was based solely upon diversity of citizenship pursuant to 28 U.S.C. §1332 (a). The Complaint sought to recover for personal injuries sustained by Saalfrank in an automobile accident occurring near the City of Napoleon, Ohio on May 25, 1969, involving an automobile occupied by Saalfrank and an automobile operated by O'Daniel. Shortly thereafter, on May 21, 1971, Saalfrank instituted a lawsuit in the Allen Superior Court of Allen County, State of Indiana, against Parkview, alleging personal injuries caused by the negligence of Parkview while Saalfrank was a patient in the hospital on or about May 29, 1969.

On November 5, 1971, Saalfrank, O'Daniel and O'Daniel's insurance company, Nationwide Insurance Company, executed a document entitled "Agreement Not To Execute By And Among Ned G. Saalfrank, Melva M. O'Daniel And Nationwide Insurance Company." Pursuant to such Agreement, Nationwide, in behalf of O'Daniel agreed to pay Saalfrank the sum of Forty-Five Thousand Dollars ($45,000.00). In consideration of such payment, Saalfrank agreed he would make no further attempt to collect any additional amount from either O'Daniel or Nationwide. Additionally, Saalfrank agreed to reimburse Nationwide for the aforementioned payment of Forty-Five Thousand Dollars ($45,000.00) to the extent that his recovery against any other party exceeded Two Hundred Fifty Thousand Dollars ($250,000.00).

Having settled his case with O'Daniel and Nationwide, Saalfrank's counsel, Mr. Wyneken, then corresponded with

counsel for defendant O'Daniel and Nationwide, and recommended defendant make Parkview a third-party defendant. To assist O'Daniel's counsel in so doing, Saalfrank's counsel prepared for O'Daniel's use a Motion with Memorandum, a proposed Complaint, a proposed Order, a proposed instruction form for the U. S. Marshal, and a proposed Summons. A week later, November 18, 1971, Saalfrank's counsel again corresponded with O'Daniel's counsel wherein he stated that his (Saalfrank's counsel) recommended strategy of making Parkview a third-party defendant was correct and that defendant would have much to gain and nothing to lose by impleading Parkview as a third-party defendant. Saalfrank's counsel then stated that his "ulterior motive" in this strategy was to allow Saalfrank to assert a direct claim against Parkview.

On January 21, 1972, O'Daniel filed her third-party action against Parkview on the theory of indemnification and/or contribution. Shortly thereafter, April 28, 1972, Saalfrank filed his pleading designated as "Third-Party Complaint" so as to assert a direct claim against Parkview. Pursuant to Parkview's motion, this claim was dismissed by the Trial Court on October 6, 1972 on the grounds that there was no diversity between Saalfrank and Parkview.

In the meantime, during June, 1973, Saalfrank tried his action against Parkview in the state court of Indiana (Allen Superior Court, Fort Wayne, Indiana) which ended in a hung jury. That case has been pending re-trial since then.

Following the joinder of O'Daniel's liability insurance carrier, Nationwide Insurance Company, as the real party in interest in lieu of O'Daniel, and with the issues duly made up, a trial to the District Court was commenced on May 28, 1974, the right to a jury trial having previously

been waived subsequent to pre-trial conference. The trial was concluded on June 3, 1974. At its conclusion, the District Court directed that no probative evidence existed to impose liability on third-party defendants, Ford Motor Company or Don Cramer Ford, Inc., and accordingly, dismissed all claims against them asserted by Saalfrank and O'Daniel.

On June 21, 1974, three (3) weeks after trial, Saalfrank filed a Motion for Vacation of Interlocutory Order requesting, again, that he be allowed to assert a direct claim for relief against Parkview. This motion was denied on June 26, 1974, and no direct claim was allowed.

On September 18, 1974, Saalfrank filed a Renewed Motion for Vacation of Interlocutory Order. The Trial Court, by its Memorandum and Order of September 27, 1974 (four months after the trial) granted this motion and allowed Saalfrank to assert a direct claim against Parkview.

Thereafter, following two (2) amendments, the District Court entered judgment in favor of Saalfrank and directly against Parkview. It also granted O'Daniel an indemnification judgment against Parkview conditioned upon O'Daniel's payment to Saalfrank of monies in excess of Fifty Thousand Dollars ($50,000.00).

In reversing the District Court, the United States Court of Appeals for the Sixth Circuit, reviewing and relying on authority from other circuits involving this jurisdictional point, concluded that an independent basis of jurisdiction would be necessary before Saalfrank could directly sue and recover from Parkview, a non-diverse third-party defendant in a federal court. In addition to the authority from other circuits which supported this position, the Court of Appeals also emphasized the fact that the state courts

of Indiana had already acquired jurisdiction over the malpractice action brought by Saalfrank, an Indiana resident, against Parkview, an Indiana hospital. The Court observed that the "State of Indiana has a significant interest in such an action" (Pet. App., p. A29).

In holding that the District Court erred in retroactively realigning the parties nearly four (4) months following trial pursuant to Rule 54(b), Federal Rules of Civil Procedure, so as to allow Saalfrank to assert a direct claim against Parkview, the Court of Appeals concluded that this rule was not designed to permit realignment of parties after trial such as attempted by the District Court in this case. Especially since Parkview had "every right to believe, based on the previous ruling of the trial judge", that the direct claim by Saalfrank was not within the jurisdiction of the District Court (Pet. App., p. A29).

The Court of Appeals also was troubled with the prejudice which would occur to Parkview under the District Court's application of Rule 54(b). The Court noted that when Parkview permitted the case to be tried without reinstating its demand for a jury trial, the District Court had already ruled that it had no subject matter jurisdiction to entertain Saalfrank's direct claim against Parkview. Had such a direct claim been permitted prior to waiver of right to jury trial by Parkview, the Court of Appeals observed that the considerations on the part of Parkview in deciding whether to waive jury trial would have been much different (Pet. App., p. A30).

Finally, the Court of Appeals held that under the record before it, O'Daniel had no right of indemnification against Parkview in light of its "Agreement Not To Execute" which completely shielded O'Daniel and her insurer from payment of any monies to Saalfrank on behalf of Parkview (Pet. App., p. A30).

ARGUMENT

There Is No Conflict Among the Circuit Courts of Appeals With Respect to the Holding in This Case by the United States Court of Appeals for the Sixth Circuit Regarding the Jurisdictional Issue.

The Court of Appeals, in the case at bar, held that the District Court erred when it allowed Saalfrank, an Indiana resident, in an action based solely on diversity of citizenship pursuant to 28 U.S.C. §1332(a), to assert a direct claim against Parkview, an Indiana hospital, in the absence of an independent ground of subject matter jurisdiction between the two. Parkview had originally been impleaded by O'Daniel, an Ohio defendant whom Saalfrank originally sued.

In support of his Petition for Writ of Certiorari, Saalfrank argues that a conflict exists among the various circuit courts on this issue, and, accordingly, certiorari should be granted (Pet., p. 8, 9).

Parkview respectfully submits that no conflict exists, and in fact, those circuits which have dealt with this issue are in accord with the holding of the United States Court of Appeals for the Sixth Circuit in this case.

As the Court of Appeals accurately observed, the District Court exercised pendent jurisdiction over Parkview primarily on the authority of *United Mine Workers v. Gibbs* (1966), 383 U.S. 715, 16 L. Ed. 2d 218. However, this decision is distinguishable on two important grounds. First and foremost, *Gibbs* found the *power* to exercise pendent jurisdiction over a state claim based upon the existence of a "substantial federal claim" to which the state claim was so closely related as to permit the conclu-

sion that the entire action was but one constitutional case. No such "substantial federal claim" is presented in the case at bar as this is a case based solely on state law. The basis for subject matter jurisdiction is diversity of citizenship only.

Secondly, the Court of Appeals also pointed to the fact that *Gibbs* involved an additional claim asserted against the same defendant. It did not involve a plaintiff asserting a claim against a third-party defendant over whom no independent basis for jurisdiction existed.

Accordingly, the Court of Appeals rightfully concluded that *Gibbs* and its progeny did not afford a basis for permitting Saalfrank to assert a direct claim against Parkview, a non-diverse party, since no "substantial federal claim" was present, and to allow such a direct claim would destroy complete diversity of citizenship.

It cannot be forgotten that in dealing with the matter of diversity of citizenship, we are dealing with a constitutional rather than a legislative question. Unlike questions relating to the "amount in controversy", on which the Constitution of the United States is silent and in connection with which legislative discretion is permitted, the Constitution of the United States requires as a condition precedent to the exercise of judicial power in cases where no federal question is involved, that the controversy be "between citizens of different states." Article III, §2.

Within the area of this limitation, no room exists for the exercise of legislation—judicial or otherwise.

Numerous circuits, in dealing with situations wherein complete diversity exists but one or more of the plaintiffs' claims fail to satisfy the "amount in controversy" requirement of Ten Thousand Dollars ($10,000.00), have held that, under the concept of pendent jurisdiction as set forth

in *Gibbs*, all of the claims may be heard in the federal case. *Jacobson v. Atlantic City Hosp.* (3rd Cir., 1968), 392 F.2d 149; *Wilson v. American Chain & Cable Co.* (3rd Cir., 1966), 364 F.2d 558; *Stone v. Stone* (4th Cir., 1968), 405 F.2d 94; *F. C. Stiles Contracting Co. v. Home Ins. Co.* (6th Cir., 1970), 431 F.2d 917; *Beautytuft, Inc. v. Factory Ins. Assoc.* (6th Cir., 1970), 431 F.2d 1122; *Hatridge v. Aetna Cas. & Sur. Co.* (8th Cir., 1969), 415 F.2d 809. Not so, however, in situations where to permit the claim would destroy complete diversity of citizenship.

In an effort to show a conflict among the circuits on this question, Saalfrank points to the Third, Fourth, Sixth and Tenth Circuits as those taking a "generally restrictive" view of the application of pendent or ancillary jurisdiction to this case while citing the Eighth and Ninth Circuits as those taking a more liberal position on the question (Pet., p. 8, 9). Parkview would suggest, however, that *no such conflict exists.*

The Fourth Circuit has addressed the precise issue herein presented and held that no *power* exists on the part of a federal district court to destroy complete diversity of citizenship through the utilization of pendent jurisdiction. In *Kenrose Mfg. Co., Inc. v. Fred Whitaker Co., Inc.* (4th Cir., 1972), 512 F.2d 890, a Virginia plaintiff amended its Complaint to assert a direct claim against a Virginia third-party defendant who had been impleaded by a Pennsylvania defendant. In affirming the trial court's dismissal and holding that such a claim would exceed the limits of the Court's power absent an independent jurisdictional basis, Judge Sobeloff wrote:

> "Notwithstanding the acknowledged relaxation of jurisdictional requirements in federal third-party practice, *we agree with the District Judge that the course of action proposed by plaintiff would exceed the limits*

of the court's power. We therefore affirm the District Court's order dismissing the amended complaint against the third-party defendant for lack of subject-matter jurisdiction." (512 F.2d at 892) (Emphasis added).

With respect to any "conflict" existing regarding the question of whether an independent basis of jurisdiction was needed for a plaintiff to pursue a third-party defendant, Judge Sobeloff observed:

> "Many courts have considered whether an independent basis of jurisdiction is necessary to support a plaintiff's action against a third-party defendant. *With impressive consistency the overwhelming majority has held an independent jurisdictional basis to be a prerequisite to the maintenance of such a claim."* (512 F.2d at 893) (Emphasis added).

More recently, in *Parker v. W. W. Moore & Sons, Inc.* (4th Cir., 1975), 528 F.2d 764, the Fourth Circuit was confronted with the question of whether ancillary jurisdiction exists in a diversity case so as to permit a plaintiff to directly assert a claim against a non-diverse third-party defendant. The Court again held that an independent ground of jurisdiction had to exist between plaintiff and the third-party defendant. The Court, through Judge Haynsworth, expressly condemned what it termed a misuse of the doctrine of pendent jurisdiction in *Wittersheim v. General Transportation Services, Inc.* (E.D., Va., 1974), 378 F. Supp. 762[1] by stating:

> "It [pendent/ancillary jurisdiction] was not designed to bring into the diversity jurisdiction claims between

1. This case was decided after *Kenrose Mfg. Co. v. Fred Whitaker Co.* (4th Cir., 1972), 512 F.2d 890, but *before* the *Kenrose* opinion was published and accordingly, should not be considered as conflicting authority.

> parties who are citizens of the same state." (528 F.2d at 766)

Likewise, the Third Circuit has disallowed the assertion of pendent or ancillary jurisdiction so as to destroy diversity of citizenship. In *Seyler v. Steuben Motors, Inc., et al.* (3rd Cir., 1972), 462 F.2d 181, the court expressly held that the "amount in controversy" cases, including the *Jacobson* and *Wilson* cases, *supra,* were inapplicable and provide no precedent for an action between citizens of the same state, in a Federal Court, when there is no Federal claim involved:

> *"Appellants' reliance on the doctrines of pendent or ancillary jurisdiction is misplaced. This is not a commingling of a state claim with one based on a federal question.* United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); nor do the claims come within the ambit of Borror v. Sharon Steel Co., 327 F.2d 165 (3rd Cir., 1964). Wilson v. American Chain & Cable Co., 364 F.2d 558 (3rd Cir., 1966), and Jacobson v. Atlantic City Hospital, 392 F.2d 149 (3rd Cir., 1968), also relied upon by appellant, dealt with amounts in controversy and not the doctrine of complete diversity." (462 F.2d 181-182) (Emphasis added).

Saalfrank's assertion that the Eighth and Ninth Circuits are in conflict with the Third, Fourth, Sixth and Tenth Circuits is ill-founded. Saalfrank cites *Hatridge v. Aetna Cas. & Sur. Co.* (8th Cir., 1969), 415 F.2d 809 and *Hymer v. Chai* (9th Cir., 1969), 407 F.2d 136, in support of this proposition. However, a perusal of these decisions evinces no conflict at all.

In *Hatridge*, complete diversity existed between plaintiffs (two husbands and their wives), residents of Arkan-

sas, and defendant, a foreign insurance company doing business in Arkansas. In fact, the *Hatridge* case involves an "amount in controversy" situation where one or more of the plaintiffs did not have a claim exceeding the jurisdictional amount of Ten Thousand Dollars ($10,000.00). By way of the concept of pendent jurisdiction, all claims were allowed to be pursued in the Federal Court since at least one of them exceeded the required jurisdictional amount and the claims were closely intertwined and interdependent.

Decisions from the Third, Fourth, and Sixth Circuits have allowed the application of pendent jurisdiction to "amount in controversy" situations as well. See *Wilson v. American Chain & Cable Co.* (3rd Cir., 1966), *supra; Stone v. Stone* (4th Cir., 1968), *supra; F. C. Stiles Contracting Co. v. Home Ins. Co.* (6th Cir., 1970), *supra; Beautytuft, Inc. v. Factory Ins. Assoc.* (6th Cir., 1970), *supra.* In each of these cases, complete diversity existed.

Saalfrank's reliance on *Hymer v. Chai* (9th Cir., 1969), 407 F.2d 136, as demonstrating a liberal approach to the application of pendent or ancillary jurisdiction is misplaced. If anything, *Hymer* demonstrates the most *restrictive* stand of any of the circuits with regard to pendent or ancillary jurisdiction. The *Hymer* case involved a diversity suit where, as in the aforecited cases, one of the plaintiffs' claims did not exceed Ten Thousand Dollars ($10,000.00). The Ninth Circuit held that there was no jurisdictional power, pendent or otherwise, to entertain the claim which failed to satisfy the amount in controversy requirement.

Saalfrank has failed to demonstrate any conflict among the various circuits with regard to the application of pendent or ancillary jurisdiction to the instant situation. Just the opposite is true. Those circuits that have dealt with

the issue have consistently held that a plaintiff must have an independent basis for jurisdiction before it can proceed directly against a third-party defendant where original subject matter jurisdiction is founded on diversity of citizenship alone.

Not surprisingly, the decisions from the district courts give one-sided support to this proposition as well. See *Wolgin v. Atlas United Financial Corporation* (E.D., Pa., 1975), 397 F. Supp. 1003; *United Pacific, et al. v. City of Lewiston* (D., Ida., 1974), 372 F. Supp. 700; *Joseph, et al. v. Chrysler Corp., et al.* (W.D., Pa., 1973), 61 F.R.D. 347; *Mickelic v. United States Postal Service* (W.D., Pa., 1973), 367 F. Supp. 1036; *Insurance Company of North America v. Blindauers Sheet Metal and Heating Co.* (E.D. Wisc., 1973), 61 F.R.D. 323; *Campbell v. The Triangle Corporation, et al.* (E.D., Pa., 1972), 56 F.R.D. 480; *Jones, et al. v. City of Houma* (E.D., La., 1972), 339 F. Supp. 473; *Sherrell, et al. v. Mitchell Aero, Inc.* (E.D., Wisc., 1971), 340 F. Supp. 219; *Kenrose Mfg. Co. v. Fred Whitaker Company, et al.* (W.D., Va., 1971), 53 F.R.D. 491; *Robison, et al. v. Castello, et al.* (E.D., La., 1971), 331 F. Supp. 667; *Ayoub v. Helm's Express, Inc.* (W.D., Pa., 1969), 300 F. Supp. 473; *Lawes v. Nutter* (S.D., Tex., 1968), 292 F. Supp. 890; *Olivieri v. Adams, et al.* (E.D., Pa., 1968), 280 F. Supp. 428.

Typical of the foregoing cases is *Olivieri v. Adams, supra,* in which the court accurately summarized the United States Supreme Court's holding in *Hurn v. Oursler* (1933), 289 U.S. 238, 77 L. Ed. 1148, and *Gibbs, supra,* as follows:

> *"Hurn and Gibbs, as well as their forebears and their progeny all require a substantial federal question claim as the basis for the federal court's jurisdiction over a case before the federal court may exer-*

cise pendent jurisdiction over non-federal claims of the same plaintiff against the same defendant. The reason for the requirement appears clear enough. Federal questions are for the federal courts to decide. Assuming the existence of such a federal question, in order to avoid piecemeal litigation and to promote convenience and judicial economy, the doctrine of pendent jurisdiction permits (not requires) the federal courts to decide not only the federal question claims but also to adjudicate the state law claims in the same 'cause of action' (Hurn) or 'case' (Gibbs).

The reason underlying the doctrine, the special competence of the federal courts to decide federal questions, simply does not exist in diversity cases in which, under Erie R.R. Co. v. Tompkins, federal courts are required to apply state law. The cases before us, of course, involve no federal question claims, they present only state law claims." (280 F. Supp. at 430) (Emphasis added) (Footnotes omitted).

Adopting the language of the Court in *Olivieri, supra,* the case at bar involves "no federal question claims." It presents only "state law claims"; and, as between Saalfrank and Parkview the most it could ever present would be "state law claims" arising under the law of Indiana. As the Court of Appeals stated, "The State of Indiana has a significant interest in such an action." (Pet. App., p. A29).

It is unthinkable that a United States District Court in Ohio could assume jurisdiction of such claim, based on Indiana law when (1) no federal issue is involved; (2) diversity of citizenship does not exist; and (3) the very claim is pending retrial before the state courts of Indiana.

Respondent, Parkview, would request that the Petition for Writ of Certiorari be denied.

The Circumstances of This Case Make It Particularly Unsuited for the Exercise of Pendent or Ancillary Jurisdiction.

The Court of Appeals concluded that the District Court abused its discretion in permitting Saalfrank to recover from Parkview under the circumstances of this case (Pet. App., p. A29). While Parkview firmly believes that the District Court lacked the power to permit such a claim, nevertheless, the circumstances of this case make it especially inappropriate for the application of pendent or ancillary jurisdiction assuming arguendo, that such a power exists. Accordingly, the Petition for Writ of Certiorari should be denied.

First, the claim between Saalfrank and Parkview had already been tried in the state courts of Indiana and was pending retrial at the time of the federal trial. As the Sixth Circuit observed, "The fact that the first trial ended in a mistrial should not oust the Indiana state court of jurisdiction to adjudicate a malpractice action by an Indiana resident against an Indiana hospital. The State of Indiana has a significant interest in such an action." (Pet. App. p. A29).

Second, and more importantly, the purpose for impleading Parkview in the first instance was to allow Saalfrank to attempt to do indirectly that which he could not do directly—sue Parkview in a federal court.

Common sense, as well as case law, reveals that one of the primary reasons for requiring an independent jurisdictional ground before allowing a plaintiff to amend his complaint so as to assert a direct claim against a third-

party defendant involves the opportunity for collusion. It affords the plaintiff an opportunity, with the help of a friendly defendant, to do indirectly that which he cannot do directly.

The collusion that is sought to be averted was identified in *Heintz & Co., Inc. v. Provident Tradesmens Bank and Trust Company* (E.D., Pa., 1962), 30 F.R.D. 171, as being:

> ". . . That possibility [collusion] would certainly be present had a resident plaintiff been permitted to amend against a resident third party defendant. *Plaintiff would need only to select an original defendant who would cooperate in bringing on the record the defendant whom plaintiff really wanted.*" (30 F.R.D. at 174) (Emphasis added).

This is precisely what occurred in the case at bar. Prior to any attempts being made by O'Daniel to implead Parkview as a third-party defendant, Saalfrank, O'Daniel and her insurer, Nationwide, entered into an "Agreement Not To Execute". In effect, Saalfrank and O'Daniel settled their differences with the execution of this agreement on November 5, 1971.

Pursuant to this agreement, Nationwide paid Forty-Five Thousand Dollars ($45,000.00) to Saalfrank in return for Saalfrank's promise to make no further attempt to collect any additional amount, at any time, from either O'Daniel or Nationwide. Additionally, Saalfrank agreed that if he should recover in excess of Two Hundred Fifty Thousand Dollars ($250,000.00) from any other persons, he would reimburse Nationwide to the full extent of such excess up to Forty-Five Thousand Dollars ($45,000.00).

Subsequent to this agreement, Saalfrank's attorney recommended to O'Daniel's attorney that O'Daniel make

Parkview a third-party defendant in the federal action under the theory of indemnification. To assist O'Daniel in this respect, Saalfrank's attorney prepared and enclosed for O'Daniel's use, various pleadings, summonses, memoranda and other documents which O'Daniel's attorney signed and filed.

Then, Saalfrank's attorney candidly admitted the purpose of the entire scheme when he wrote to O'Daniel's attorney, stating: ". . . you have a great deal to gain and nothing to lose by making the hospital your defendant on the theory that you are entitled to indemnification . . . *I should not deny that our purpose in proposing this action has the ulterior motive of making it possible to also make the hospital the defendant of Mr. Saalfrank in the same proceedings . . .*" (Pet. App., p. A23). Subsequent thereto, O'Daniel impleaded Parkview as a third-party defendant under the theory of indemnification.

From the foregoing, it is manifest that with the execution of the "Agreement Not To Execute" on November 5, 1971, O'Daniel was no longer an adversary of Saalfrank. She and her insurer were strawmen in an action with "a great deal to gain and nothing to lose". They (O'Daniel and Nationwide) had clearly joined forces with Saalfrank in an effort to assist the latter in recovering against Parkview and in turn, hopefully recovering some of the insurer's payment.

O'Daniel's *only* function for remaining in this action was to bring in Parkview by way of the third-party action so that Saalfrank could amend his complaint and proceed directly against Parkview. As previously noted, Saalfrank's counsel candidly admitted this. In other words, Saalfrank's primary claim was against Parkview—not O'Daniel.

Under such circumstances, even assuming that a federal court has the power to exercise pendent or ancillary jurisdiction in a diversity case, it would be improper and inappropriate to exercise it. This was recognized by Judge Haynsworth in *Parker v. W. W. Moore & Sons, Inc.* (4th Cir., 1975), 528 F.2d 764, wherein the court stated:

> "From what we can gather from the pleadings, it appears quite likely that when the litigation comes to a conclusion it will clearly appear that the plaintiff's primary claim is against Moore [third-party defendant] and not against Inclinator [defendant] . . . From all that we can now foresee, however, the whole of plaintiff's claim may well prove to be entirely a state court claim. Under those circumstances, the state claim against Moore should not be swept into the diversity jurisdiction on the basis of a facial statement of a related claim against Inclinator, which alone would be triable in the federal court because of diversity of citizenship.
>
> "We . . . conclude that there is no ancillary federal jurisdiction of the plaintiff's claim against Moore." (528 F.2d at 766)

Thus, the collusive conduct on the part of Saalfrank and O'Daniel in impleading Parkview into the action, when O'Daniel in fact had no right of indemnification, for the sole purpose of allowing Saalfrank to assert a direct claim against this non-diverse third-party defendant should make it abundantly clear why this case is one especially inappropriate for the exercise of pendent or ancillary jurisdiction.

A third reason, equally important and interrelated with the prior one, concerns the impropriety of impleading Parkview as a third-party defendant.

The Court of Appeals held that O'Daniel had no right to be indemnified by Parkview (Pet. App., p. A30). This holding is not in dispute.

In essence, the Court of Appeals made this holding in light of the fact that neither O'Daniel nor her insurer, Nationwide, had made any payment to Saalfrank on behalf of Parkview (Pet. App., p. A5). Nor could O'Daniel or Nationwide be compelled to pay any monies in the future to Saalfrank in behalf of Parkview. The "Agreement Not To Execute" entered into by Saalfrank, O'Daniel and Nationwide completely shielded O'Daniel and Nationwide from any obligation or requirement to pay any additional sums (Pet. App., p. A30).

This holding is in complete accord with the law of the State of Ohio wherein no right to indemnify arises except upon payment of a judgment and expenses. *Maryland Casualty Co. v. Frederick Co.* (1944), 142 Ohio St. 605, 53 N.E.2d 795, 798-799. See also *Aetna Cas. & Sur. Co. v. Buckeye Union Casualty Co.* (1952), 157 Ohio St. 385, 105 N.E.2d 568; *O'Neill v. City of Cleveland* (1945), 145 Ohio St. 563, 62 N.E.2d 353; RESTATEMENT OF RESTITUTION, §§76-77, 80 and 96.

The importance of this holding is that it extinguishes the initial alleged link with which the District Court orignally asserted jurisdiction over Parkview, i.e., third-party complaint by O'Daniel for indemnification. No right for indemnification existed. Accordingly, the original basis for jurisdiction was non-existent.

This lack of an original jurisdictional basis under the non-existent right of indemnification evinces in a clear and unequivocal fashion just what Saalfrank was attempting. On the basis of a "facial statement" that O'Daniel had a right to be indemnified by Parkview, Parkview was impleaded as a third-party defendant. In fact, no

right to indemnification existed. In fact, the sole and ultimate purpose of the impleading was to allow Saalfrank, through the exercise of pendent or ancillary jurisdiction, to sue Parkview directly in the District Court.

The situation is no different than if Saalfrank had originally filed his suit naming O'Daniel and Parkview as defendants. This he could not do.

Respondent, Parkview, would respectfully submit that the aforedescribed circumstances of this particular case make it patently inappropriate to exercise pendent or ancillary jurisdiction, even assuming such power existed. The Petition for Writ of Certiorari should be denied.

The Court of Appeals' Holding in This Case Does Not Conflict With Any Decision of the Supreme Court of the United States.

It would appear that this Court has yet to pass upon the precise jurisdictional issue decided by the Court of Appeals herein. However, the recent decision of this Court in *Aldinger v. Howard* (1976), ... U.S. ....., 49 L. Ed. 2d 276, leaves little doubt as to the correctness of the Court of Appeals' decision in requiring a plaintiff, in a diversity action, to have an independent jurisdictional basis in order to file a direct claim against a third-party defendant. Especially so where the original basis for impleading the third-party is found to be non-existent.

In *Aldinger*, this Court held regarding the issue of pendent party jurisdiction with respect to 28 U.S.C. §1343 and 42 U.S.C. §1983, that if the party sought to be impleaded was not otherwise subject to federal jurisdiction, a federal court must satisfy itself not only that Article III of the United States Constitution permits the impleading, but also that Congress in its statutes conferring jurisdiction has not expressly or implicitly negated the jurisdiction.

Justice Rehnquist, in writing for the majority, made the following astute observation regarding the application of pendent or ancillary jurisdiction:

> "But it is quite another thing to permit a plaintiff, who has asserted a claim against one defendant with respect to which there is federal jurisdiction, to implead an entirely different defendant on the basis of a state law claim over which there is no independent basis of federal jurisdiction, simply because his claim against the first defendant and his claim against the second defendant 'derive from a common nucleus of operative fact'. . . . But the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress." (49 L. Ed. 2d at 286-287)

With the Court of Appeals' holding, which is not in dispute, that a right of indemnification in behalf of O'Daniel and against Parkview did not exist in light of the "Agreement Not To Execute" (Pet. App., p. A30), the net effect of what occurred in the District Court was that Saalfrank was permitted to directly sue a non-diverse *defendant* in a case whose jurisdictional basis was diversity of citizenship. Article III, §2, *supra*, expressly prohibits this.

Accordingly, although the *Aldinger* case does not speak to the precise factual setting of the instant situation, the necessary implication to be derived from *Aldinger* is that in the case at bar, Saalfrank must have an independent ground of jurisdiction before he can proceed directly against Parkview. No such jurisdictional basis exists.

Rule 54, Federal Rules of Civil Procedure, Does Not Authorize the Retroactive Extension of Jurisdiction Over a State Law Claim Upon Which Issues Have Neither Been Formed nor Tried.

At all times during the pendency of the lawsuit and conduct of the trial in the District Court and until nearly four (4) months after the trial, Parkview was a third-party defendant to an alleged claim of indemnification brought by O'Daniel. On two (2) prior occasions (once before and once after trial), Saalfrank had moved the District Court for authority to sue Parkview directly. On each occasion, the motion was denied on the ground that to do so would destroy subject matter jurisdiction.

Pursuant to the pre-trial conference prior to trial, while Parkview was still a third-party defendant, the right to jury trial was waived by it. This was done knowing that the District Court had already ruled that Saalfrank could not proceed directly against Parkview in the action.

As the Sixth Circuit observed:

> "Since Parkview was only in the case with respect to a third party complaint claiming indemnity, its counsel might properly have concluded that a jury trial would be of no particular benefit to it. The considerations on whether to reinstate the jury demand could certainly have been quite different if Parkview had known it would be required to defend Saalfrank's claim directly, with Ford and Kremer as well as O'Daniel as co-defendants and an insurance company as one of the plaintiffs. From the record it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the district court's previous rulings." (Pet. App., p. A30)

Saalfrank argues in his Petition for Writ of Certiorari that the ruling of the Court of Appeals greatly restricts the usefulness of Rule 54(b) as a means of resolving cases with multiple issues and parties (Pet., p. 11). Yet, Saalfrank cites absolutely no authority to support his contention that Rule 54(b) was intended to be utilized as did the District Court. The reason for this is that no such authority exists.

Rule 54(b) was never intended to be used as attempted in this case. It was never intended to be used to the prejudice and detriment of a party such as occurred herein.

The Court of Appeals concluded that, based on the record before it, ". . . it would be impossible to conclude that Parkview suffered no prejudice from the reversal of the district court's previous rulings." (Pet. App., p. A30). A clearer statement that prejudice occurred to Parkview by the realignment of parties would be hard to imagine.

Saalfrank concedes that Rule 54(b) may not be applied so as to prejudice a party (Pet., p. 12). However, Saalfrank further argues that the Court of Appeals did not really say what it said (Pet., p. 12).

With respect to both the issue regarding the application of pendent or ancillary jurisdiction as well as the issue involving the Court of Appeals' interpretation of Rule 54(b), Federal Rules of Civil Procedure, Saalfrank has presented absolutely no questions or grounds which warrant the further attention of this Court.

The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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